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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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| In the Matter of |) | |
| Implementation of the Pay Telephone |) | CC Docket No. 96-128 |
| Reclassification and Compensation |) | |
| Provisions of the |) | |
| Telecommunications Act of the 1996 |) | |

REPLY COMMENTS OF TELCO COMMUNICATIONS GROUP, INC.
ON ITS PETITION FOR WAIVER OF
SECTION 64.1301 OF THE COMMISSION'S RULES

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SUMMARY

Both Telco's waiver petition and the submitted comments demonstrate that granting Telco a waiver to pay per-call compensation during the interim compensation period is the only viable option that would be consistent with the Telecommunications Act of 1996 and would best further the public interest. Telco notes that the RBOC Payphone Coalition, comprising ownership of the largest number of payphones, supports Telco's waiver. Other interexchange carriers, such as MIDCOM Communications and Business Telecom, Inc. also registered support for Telco's waiver.

The Commission should grant Telco's waiver because its request meets all appropriate waiver standards and would advance the public interest. Section 1.3 of the Commission's rules grant it authority to waive any provision of its rules if good cause is shown, which provides the Commission with the necessary authority to grant Telco's waiver in this situation. Moreover, Telco has met the appropriate waiver standards. First, the vast discrepancy between Telco's obligation under the interim compensation plan and the number of calls it actually carries, in addition to its ability to track its payphone obligation per-call, easily constitutes special circumstances warranting a waiver. Second, grant of Telco's waiver will not harm other parties. Telco has requested only that the Commission allow it to pay its portion of interim compensation on a per-call basis, and does not seek to reallocate interim compensation obligations. APCC and payphone owners will not be harmed by Telco's waiver because they will receive from Telco efficient payment for all payphone calls Telco carries. Third, grant of Telco's waiver will further the Telecommunications Act of 1996 and Commission policy favoring per-call compensation.

None of the positions taken in opposition to Telco's petition negates Telco's showing and prevents the Commission from granting Telco's request. No party has disputed that under a flat rate compensation system Telco will pay nine time more than it would pay under a per-call compensation

system. Their arguments fundamentally rely upon a mechanical application of the Commission's rule that defies simple fairness.

First, a mutual agreement is not required to allow the Commission to grant Telco's waiver. Section 1.3 of the Commission's rules allow it to waive any of its rules as necessary under the circumstances. The Commission should also reject APCC's argument that granting the waiver will harm application of the interim rule. If other carriers request waivers, the Commission must review such waivers on a case-by-case basis; granting Telco's waiver does not mean other requests will be granted automatically. Moreover, the Commission, in declining to accept a mixed system in which some carriers pay flat rate compensation and some carriers pay per-call did not contemplate Telco's special circumstances. The interim compensation plan was intended to reasonably approximate what interexchange carriers would have to pay on a per-call basis.

Telco is not seeking a new rule or an amendment to an existing rule on a retroactive basis. Telco is simply seeking a qualified dispensation from the illogical application of a temporary rule on the grounds that it is warranted by highly unusual circumstances. In addition, the Commission has the ability and has in the past granted waivers with retroactive effect. Therefore, APCC's retroactive waiver argument must fail.

Finally, Telco was not dilatory in its waiver request. Telco received insufficient notice from the Commission that it would be required to compensate payphone owners for calls its did not carry. Telco filed its waiver petition as soon as it formulated a system to track and compensate payphone owners per-call and realized that it would be vastly overcompensating payphone owners pursuant to the Commission's interim compensation plan.

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**REPLY COMMENTS OF TELCO COMMUNICATIONS GROUP, INC.
ON ITS PETITION FOR WAIVER OF
SECTION 64.1301 OF THE COMMISSION'S RULES**

Telco Communications Group, Inc., on behalf of its operating subsidiaries ("Telco"), by its undersigned counsel and pursuant to the Commission's Public Notice released May 13, 1997, respectfully submits its Reply Comments in support of its Petition for a waiver of Section 64.1301 of the Commission's Rules. Telco has requested that it be permitted to pay its portion of interim compensation ordered by the Commission's *Payphone Order*¹ on a per-call basis.

I. INTRODUCTION

Both Telco's waiver petition and the submitted comments demonstrate that granting Telco a waiver to pay per-call compensation during the one-year interim compensation period is the only

¹ In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, *Report and Order*, CC Docket No. 96-128 (rel. Sept. 20, 1996) ("*Payphone Order*"), *Order on Reconsideration*, CC Docket No. 96-128 (rel. Nov. 8, 1996) ("*Reconsideration Order*"). These Orders are currently on appeal before the United States Court of Appeals for the District of Columbia Circuit, Docket No. 96-1394. Telco is one of the parties challenging the Orders. Although Telco does not dispute that the 1996 Act requires IXC's to pay compensation to payphone services providers ("PSPs"), the extent of that obligation is ultimately subject to determination by the federal court considering the appeal. AT&T has requested that Telco's petition be held in abeyance pending the appeal. Because the compensation owed to PSPs is currently due, Telco requests that the Commission not hold the petition in abeyance.

viable option consistent with the Telecommunications Act of 1996 (“1996 Act”) and is the option that best furthers the public interest. Telco’s waiver petition received support from both payphone owners and interexchange carriers (“IXCs”), who recognize that Telco’s willingness to move to true per-call compensation ahead of schedule is consistent with the 1996 Act and the Commission’s *Payphone Order*. The oppositions to Telco’s waiver are based on either a misunderstanding of the waiver request or a mechanical application of the Commission’s rules that not only fails to consider Telco’s special circumstances but also disregards the discretionary authority of the Commission to remedy unjust results. Indeed, it is ironic that throughout the Telephone Operator Consumer Services Improvement Act (“TOCSIA”) proceeding and the payphone proceeding at issue, American Public Communications Council (“APCC”) and Ameritech both supported per-call compensation. Now, however, when a smaller IXC wants to compensate per-call, they oppose the request because they will receive excessive compensation from this carrier pursuant to a flat rate system-- compensation for calls that this carrier plainly did not carry.

II. THE COMMENTS SHOW SUPPORT FOR TELCO’S WAIVER FROM BOTH PAYPHONE OWNERS AND INTEREXCHANGE CARRIERS

The RBOC Payphone Coalition (“RBOCs”), which together own the largest number of payphones, supports Telco’s waiver petition. Although the RBOCs would stand to lose the most in compensation from the grant of Telco’s waiver request, it stated in its comments that “Telco’s request to move to true per-call compensation ahead of schedule is consistent with the spirit and language of the Commission’s payphone orders.”²

² RBOC Comments at 2.

Interexchange carriers also supported Telco's waiver. MIDCOM Communications noted that Telco's waiver is consistent with similar waivers granted to other IXC's in the TOCSIA proceeding.³ MIDCOM also stated that granting a waiver to Telco would be in the public interest because it would ensure that payphone owners are compensated for all of Telco's calls while at the same time preventing Telco and its customers from being unfairly burdened.⁴ Business Telecom, Inc. supported Telco's waiver request and claimed that the Commission's interim compensation plan unfairly based compensation requirements on a carrier's toll revenues when toll revenues do not necessarily bear any relationship to the number of payphone calls carried by a particular IXC.⁵ This support from both the RBOCs and several interexchange carriers in the same position as Telco is persuasive evidence that granting Telco's waiver request would further the public interest.

III. GRANTING TELCO'S WAIVER WOULD FURTHER THE PUBLIC INTEREST

The Commission should grant Telco's waiver because its request meets all appropriate waiver standards and would advance the public interest. The Commission has plain authority to grant a waiver in this situation, and Telco has met the required standards for waiver of the Commission's rules. Telco has shown special circumstances, no other party will be unduly harmed by Telco's waiver, and the waiver would further both the 1996 Act and the Commission's policies.

³ MIDCOM Comments at 4-5.

⁴ MIDCOM Comments at 5.

⁵ Business Telecom Comments at 2.

A. The Commission Has Authority to Grant a Waiver in This Situation

It is plain that the Commission has broad authority to grant a waiver if strict compliance with a particular rule would be inconsistent with the public interest. *Northeast Cellular Telephone Company v. FCC*, 897 F.2d, 1164, 1166 (D.C. Cir. 1990). Indeed, “[t]he Commission is charged with administration in the ‘public interest.’” *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). Although an agency may promulgate rules of general application which further the public interest, the agency still must seek out the public interest in particular, individualized cases. *Id.* Pursuant to this reasoning, Section 1.3 of the Commission’s rules grants the Commission the authority to waive *any provision* of the Commission’s rules on its own motion or petition if good cause is shown. 47 C.F.R. § 1.3.

As discussed below, APCC’s and Ameritech’s objections to Telco’s waiver do not prohibit the Commission from determining that the public interest would be furthered by allowing Telco to pay its portion of interim compensation per-call. The Commission clearly has that ability pursuant to Section 1.3 of its rules. Moreover, the Commission previously has granted waivers of the flat rate compensation of payphone providers over the objection of APCC. For example, the Commission recently granted Oncor Communications, Inc. a waiver to compensate PSPs on a per-call basis from April 1, 1996 through November 5, 1996.⁶ The Commission granted Oncor this waiver despite APCC’s objection.⁷

⁶ See In the Matter of Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, *Memorandum Opinion and Order*, CC Docket No. 91-35 (rel. March 7, 1997) (“*Oncor Waiver*”).

⁷ APCC Comments in Opposition to Petition for Waiver at 4. APCC had two concerns regarding Oncor’s petition. First, APCC stated that Oncor had not provided sufficient assurances

B. Telco's Request Meets the Waiver Standards

As the Commission stated in the *Oncor Waiver*, waiver of Commission rules is appropriate if special circumstances warrant a deviation from the general rule and such deviation serves the public interest. *Oncor Waiver* at ¶ 12, citing *Northeast Cellular* and *WAIT Radio*.

1. Telco Has Shown Special Circumstances

Telco has demonstrated special circumstances sufficient to support granting this waiver. As explained in its waiver petition, Telco derives the vast majority of its revenues through casual calling, which requires customers to dial one of Telco's five-digit carrier identification codes prior to placing direct dialed long distance calls. This service bills calls to the telephone from which the call is dialed. For obvious reasons, these calls cannot be completed from payphones. Specifically, when ordering originating access circuits from the LEC, Telco instructs the LEC to prohibit the completion of casual calls (either direct dialed or operator assisted) which would be billed to the assisting telephone (*i.e.*, the payphone).⁸ Accordingly, Telco receives very few calls from payphones. However, the unique nature of Telco's business was not accounted for when the Commission formulated the interim compensation plan that is based on a percentage of a carrier's toll revenues. As Telco explained in its waiver petition, under the Commission's flat rate compensation plan, it is required to compensate payphone owners over \$51,000 per month, while

that it could track calls. In contrast, APCC has expressed no such concern that Telco is unable to track calls. In addition, APCC expressed concern that Oncor's proposal relied on the belief that its access code calls are *de minimis*. Accordingly, APCC was concerned that the waiver would impose unreasonable costs on payphone providers to ensure that they are adequately compensated for any Oncor calls. Despite this objection, the Commission granted Oncor's petition.

⁸ See Telco Waiver Petition at 4.

if Telco paid on a per-call basis it would only be required to pay approximately \$5,300.⁹ Therefore, Telco is being required to pay roughly nine times more than its actual use of the PSPs' services. In addition, Telco has the ability to track and pay per-call, which contrary to APCC's claim, is not currently true for most IXC's.

In a complete disregard for the severity of this payment imbalance, APCC claims that Telco is no differently situated than any other carrier. APCC claims that the logic of the interim compensation system requires that some will pay more and some will pay less than their exact share, and the fact that Telco must pay more does not call for the relief requested.¹⁰ No system, however, other than one that is admittedly arbitrary and capricious, would require one carrier to pay nine times its share on the grounds that some pay more, some pay less. Taking its argument to its logical extension, APCC may as well have said that the Commission could have simply ordered AT&T and Sprint to pay the entire amount owed to PSPs during the interim period. Neither result comports with fairness or sound policy.

Telco's situation is unique from other carriers. If Telco's revenues did not rely so heavily on casual calling--a service which is blocked from payphones--Telco would most likely receive a number of payphone calls more commensurate with its toll revenues. Although some other carriers may be paying slightly more under the Commission's flat rate compensation plan than they would pay per-call, no other carrier has come forward with so shocking a discrepancy. Certainly the Commission based a carrier's compensation amount on its toll revenues with the intention that it

⁹ Telco Waiver Petition at 5.

¹⁰ APCC Comments at 5.

would have some relationship to the number of payphone calls carried. Telco's showing that this is not true because of the unique nature of its business and its ability to track and pay per-call is a sufficient demonstration of special circumstances.

2. Granting Telco's Waiver Will Not Harm Other Parties

AT&T, APCC, and Ameritech oppose Telco's waiver because they claim that grant of the waiver will cause harm to either payphone owners or other carriers. These claims are profoundly untrue. First, AT&T claims that granting Telco's waiver request would require the Commission to shift its portion of flat rate compensation onto other IXCs.¹¹ This was not Telco's request. Telco requested a waiver to allow it to pay *its portion* of the interim compensation on a per-call basis.¹² Telco did not request a reallocation of the payment obligations, nor does Telco believe the Commission should undertake such a task. Indeed, it is ironic that AT&T objected to Telco's waiver because Telco based its request on a very similar waiver that AT&T requested, and was granted, in the TOCSIA docket.¹³ Because the Commission's current compensation plan is based on its compensation method applied to AT&T in the TOCSIA docket, a similar result is warranted for Telco's waiver request. When the Commission granted AT&T's request to pay its portion of the \$6.00 per month TOCSIA compensation on a per-call basis, the Commission did not adjust the compensation requirements of any other IXC. This is true even in the *Oncor Waiver*, where similar

¹¹ AT&T Comments at 3-4.

¹² Telco Waiver Petition at 1.

¹³ See In the Matter of Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, *Memorandum Opinion and Order*, CC Docket No. 91-35 (rel. December 29, 1994).

to Telco, Oncor claimed that it received a very few number of payphone calls. In granting the waiver to Oncor, the Commission did not adjust the compensation amounts so that other IXC's carried the remainder of Oncor's compensation requirements.¹⁴ Nor should the Commission do so in this situation. Telco's waiver should be limited to Telco's portion of the interim compensation.

APCC's and Ameritech's claim that Telco's waiver will deprive PSPs of their rightful compensation is meritless. Under Telco's proposed waiver, the PSPs will receive compensation for *every call* that Telco carries. APCC and Ameritech, however, seem to believe that compensating them only for the calls actually carried in some way deprives them of their "rightful compensation." Requiring Telco to pay for nine calls it does not carry for each call that it does carry is clearly not in the public interest.

In the worst case scenario, that is, if Telco carries *no* compensable calls in a given month, allowing Telco to pay per-call compensation will reduce the payment for each payphone by slightly less than 15 cents per month. Telco finds it difficult to understand how reducing the per phone compensation from \$45.85 to \$45.70 will constitute an unlawful deprivation to PSPs. Indeed, it is astonishing that in its initial comments in the payphone proceeding, APCC requested that it receive only \$40.00 per payphone during the interim compensation period, and now it characterizes receiving at least \$45.70 as some sort of deprivation.¹⁵

¹⁴ See *Oncor Waiver* at ¶12. The Commission granted Oncor a waiver to allow it to pay *its portion* of CC Docket No. 91-35 compensation on a per-call basis.

¹⁵ In its initial comments, APCC suggested that interim compensation should be for 100 calls per phone at a rate of \$0.40 per call resulting in compensation of \$40.00 per phone per month. APCC Initial Comments in Payphone Proceeding at 37.

3. Telco's Waiver Furthers the Telecommunications Act and Commission Policy

Most importantly for the purposes of granting Telco's waiver, compensating payphone owners per-call furthers the 1996 Act and Commission policy. Section 276 of the 1996 Act requires the Commission to "establish a per-call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone."¹⁶ Telco's waiver would accomplish exactly this result. Telco has proposed to compensate each payphone owner per-call for each and every completed call using their payphone carried by Telco. In arguing that Telco's waiver would be unfair to APCC because it would deprive payphone owners of being assured \$45.85 of compensation, APCC simply fails to mention that what is fair compensation to PSPs must also be fair to the parties providing the compensation. Under the plain language of the Act, regardless of the particular Commission regulations promulgated pursuant to the Act, a compensation system that is not fair is not lawful. Telco submits that it is fundamentally unfair (and unlawful) to be required to pay nine times as much compensation to PSPs as Telco rightfully owes.

In addition, the Commission has continually expressed its preference for per-call compensation. Just recently, in granting Oncor's waiver, the Commission stated its preference "for compensating PPOs on a per-call basis. . . ."¹⁷ The Commission determined that "Oncor's request for a waiver serves the public interest by encouraging PPOs to place their payphones in locations that

¹⁶ 47 U.S.C. § 276(b)(1)(A).

¹⁷ Oncor Waiver at ¶ 12.

are likely to generate the most calls.”¹⁸ The Commission reiterated this sentiment in its *Payphone Order*, stating “fair compensation can be ensured best when the PSP can track the calls made from the payphone on a call-by-call basis and be assured efficient payment of those calls.”¹⁹ Such policies would certainly be furthered by granting Telco’s waiver request. Telco would be compensating PSPs for every call made and would be compensating such PSPs on a monthly basis, which would ensure efficient payment of those calls.

IV. OPPOSITION TO TELCO’S WAIVER IS MERITLESS

As Telco has shown, special circumstances warrant a waiver from the interim compensation plan, and such a waiver would be in the public interest and consistent with Commission policy. None of the positions taken by APCC and Ameritech in opposition to Telco’s petition negates this showing and prevents the Commission from granting Telco’s request. As a preliminary matter, neither APCC nor Ameritech disputes the fact that under a flat-rate compensation system Telco will pay nine times more than it would pay under a per-call compensation system. Their arguments, therefore, fundamentally rely upon a mechanical application of the Commission’s rule that defies simple fairness. In this respect, the Commission should heed the key opinion regarding the standards for considering waiver requests:

[A]n application for waiver has an appropriate place in the discharge by an administrative agency of its assigned responsibilities. The agency’s discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances.

¹⁸ *Id.*

¹⁹ *Payphone Order* at ¶ 20.

WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C.Cir. 1969).

A. A Mutual Agreement with PSPs is Not a Requirement

APCC and Ameritech cite Paragraph 129 of the *Reconsideration Order* for the proposition that waivers from the flat-rate interim compensation plan may be granted only if the petitioning IXC has a mutual agreement with a PSP for a per-call compensation arrangement.²⁰ This argument should not preclude granting Telco's waiver for two key reasons. First, pursuant to Section 1.3 of the Commission's rules, the Commission may waive any of its rules as necessary under the circumstances. 47 CFR §1.3. The Commission is not required to specify in its orders the terms under which a waiver would be permitted. The waiver provision in the *Reconsideration Order* therefore simply constitutes one situation anticipated by the Commission that would warrant application of its waiver authority. Second, as demonstrated by the Comments of the RBOC Payphone Coalition, the owners of the majority of payphones are in support of Telco's petition, under certain agreeable conditions. To deny Telco's petition on this basis, only to have Telco and each of the members of the RBOC Payphone Coalition subsequently contract to an arrangement for which all parties are clearly in agreement now, would amount to a waste of resources.

B. Allowing the Waiver Will Not Harm Application of the Interim Rule

APCC claims that allowing the waiver will "eviscerate" the flat-rate interim compensation rule because it will open the door to other IXCs seeking a per-call compensation system.²¹ The Commission should disregard this "sky is falling" argument on the simple grounds that any waiver

²⁰ See APCC Comments at 3-4; Ameritech Comments at 2.

²¹ APCC Comments at 7.

of the Commission's rules may be granted only upon a showing of special circumstances. If another IXC has similar special circumstances where it is paying nine times more than it rightfully owes under the flat rate plan, granting it a waiver may be appropriate.²² Nevertheless, because the standard of "special circumstances" necessarily requires review on a case-by-case basis, granting Telco's waiver does not mean other requests will be granted automatically.

At the same time, APCC's fear begs the question: if so many IXCs will be flocking for a waiver of the interim compensation rule, will that not be an indication that the interim compensation plan is flawed? If the interim compensation plan truly reflected a per-call compensation plan, or was reasonably close so that the administrative costs of switching to a per-call plan outweighed the resulting benefits, there would be no need to request any adjustment.

C. The Mixed System that the Commission Declined to Accept Did Not Contemplate Telco's Special Circumstances

Both APCC and Ameritech argue that a compensation system where some IXCs would pay on a flat-rate basis and some would pay on a per-call basis was rejected in the *Reconsideration Order*.²³ The reasoning behind that decision, however, did not take into consideration the special circumstances of carriers like Telco. The unitary flat-rate system was based on two premises: an estimation of compensation owed to PSPs on a per payphone basis, and the assumption that traffic from payphones was evenly distributed among the largest interexchange carriers.²⁴ In other words,

²² Pursuant to *Northeast Cellular*, the Commission must state an articulable standard for granting Telco's waiver. Telco proposes that other waivers be granted upon a showing of imbalance between flat-rate and per-call compensation requirements similar to that of Telco.

²³ APCC Comments at 2-3; Ameritech Comments at 3.

²⁴ *Payphone Order* at ¶¶ 122-126.

the interim compensation plan was intended to reasonably approximate what IXCs would have to pay on a per-call basis.²⁵ A closer examination of each of these assumptions (such as was clearly demonstrated in Telco's waiver petition) reveals that the Commission's calculations contain enough uncertainty to justify granting Telco's waiver request.

As an approximation of the compensation that would be owed to PSPs until per-call compensation was implemented, the FCC simply multiplied an average number of uncompensated long distance calls per payphone per month (131) by a per-call cost (\$0.35) for the \$45.85 value per payphone per month that was to be paid by IXCs. Telco is asking for a reduction in its compensation obligation of less than \$0.15 per payphone per month. This amount represents less than one half of a single call (at \$0.35) per payphone per month. Therefore, if the FCC's estimate is high by only one half of one phone call per month (i.e., 130.5 rather than 131 calls per month), there is no loss whatsoever to PSPs. Keep in mind that APCC requested \$40.00 per payphone per month in this proceeding, far below the amount of \$45.85 estimated by the Commission. There is no unfairness to PSPs to allow Telco to pay now at a rate at which it will pay beginning in October.

In addition, in the *Payphone Order*, the Commission imposed the interim flat-rate compensation requirement on only those interexchange carriers with annual toll revenues in excess of \$100 million.²⁶ The Commission further explained this requirement in the *Reconsideration Order* by saying, "The interim flat-rate compensation mechanism . . . was adopted for a specific, limited transitional period, and thus applies to those carriers that carry the large majority of compensable

²⁵ *Id.* at ¶125.

²⁶ *Id.* at ¶ 119.

calls.”²⁷ Smaller carriers were excluded because the payment obligations of those carriers, which collectively account for less than five percent of IXC toll revenues, “would have been quite low in any case.”²⁸ Further, LECs were excluded from the interim flat-rate compensation obligation because, on an individual basis, they do not carry a significant volume of compensable calls.²⁹ Therefore, it is unmistakable that the key criteria for eligibility as a carrier that must pay interim compensation is the relative volume of compensable calls.

As Telco explains in its Petition, very few calls from payphones are carried by Telco because Telco primarily provides “casual calling” to its customers. While Telco does carry some traffic that constitutes “compensable calls” from a payphone, namely dial-around calls using 800 services or calling card services, this traffic appears to be an extremely small percentage of Telco’s total volume. Thus, it appears that when one considers the actual traffic from payphones carried by Telco, the company scarcely qualifies as one of the carriers “that carry the large majority of compensable calls.” In this respect, Telco appears to be more like one of the smaller IXCs or LECs that is exempt from the interim compensation mechanism.

Before the Commission should apply its interim rule mechanically, it must weigh the strength of its underlying assumptions against the clear unfairness that will result to Telco. In other words, Telco can calculate what it owes to PSPs to the exact phone call. The Commission, on the other hand, in the interests of expediency and efficient compliance with its statutory mandate,

²⁷ *Reconsideration Order at ¶ 126* (emphasis added).

²⁸ *Id.*

²⁹ *Id.*

approximated the amount of compensation owed to PSPs on a per payphone basis. The thinnest margin of error in the Commission's interim compensation plan completely eclipses the amount of compensation at issue in this petition. A one-call difference in the traffic volume translates to a \$0.35 difference in compensation for each payphone. A one-penny difference in the PSPs cost for a compensable call translates to a \$1.31 difference for each payphone for each month. Yet Telco is asking for relief in the amount of less than \$0.15 per payphone per month.

D. PSPs Don't Need Additional Time to Prepare for Per Call Compensation for Calls Carried by Telco

APCC contends that granting Telco's waiver would deprive PSPs of the opportunity to prepare for per-call compensation during the interim period.³⁰ APCC's position simply misses the point. Telco is seeking a waiver not only because it has the ability to track payphone calls on a per call basis, but also because it simply does not carry very many calls placed from payphones. With respect to verifying calls carried by Telco, PSPs have very little to prepare for anyway. Further, under the TOCSIA regime, PSPs already have been participating in a per-call compensation system. Whatever preparations were made for that plan are transferable to the per-call compensation system in this proceeding.

E. The Commission Has Granted Retroactive Waivers to Its Rules

APCC asserts that any grant of Telco's Petition should be on a prospective basis only. In making this argument, APCC creates a strawman that it then knocks down by invoking the general principle that the FCC shall make no rule on a retroactive basis without the specific mandate of Congress. Telco is not seeking a new rule or an amendment to an existing rule. Telco is simply

³⁰ APCC Comments at 9.

seeking a qualified dispensation from the illogical application of a temporary rule on the grounds that it is warranted by highly unusual circumstances. The Commission has the clear authority to grant waivers from its rules (*see WAIT Radio*), and has done so on numerous occasions.

Moreover, the Commission has granted waivers with retroactive effect on several occasions. As recently as March 7, 1997, in the Oncor Waiver, the Commission granted a waiver of a payphone compensation rule that had retroactive effect.³¹ Thus, the Commission has the authority, and clear precedent, to give retroactive effect to the waiver requested by Telco. *See In the Matter of Part 68 Waiver Request of Practical Telephony Corporation*, 11 FCC Rcd 5365 (1996); *In the Matter of American Tel. & Tel. Co.*, 9 FCC Rcd 2785 (1994); *In the Matter of American Tel. & Tel. Co.*, 9 FCC Rcd 7844 (1994).

F. Telco Was Not Dilatory in its Request

Telco has appealed the *Payphone Order* to the United States Court of Appeals for the District of Columbia Circuit on the grounds, *inter alia*, that Telco was provided insufficient notice of its potential effects. The Commission's Notice of Proposed Rulemaking ("NPRM") failed to put Telco on notice that it would be required to compensate payphone owners for calls it did not carry.³² Regarding interim compensation, the NPRM requested comment only generally on whether some measure of interim compensation should be adopted, the appropriate compensation amount, how

³¹ *Oncor Waiver* at ¶ 12. Contrary to APCC's claims, Oncor's waiver was indeed given retroactive effect. Oncor filed its petition on April 29, 1996 and the Commission granted Oncor a waiver from the period of April 1, 1996 to November 5, 1996.

³² *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Notice of Proposed Rulemaking*, CC Docket No. 96-128 (rel. June 6, 1996).

such an interim compensation mechanism could be structured and whether it “should adopt a system similar to the interim mechanism for interstate access code calls in CC Docket 91-35.” NPRM at ¶ 40.

These statements failed to give Telco notice that it might be obligated under the interim compensation plan because: (1) as a factual matter Telco does not receive many payphone calls; and (2) Telco was not required to compensate payphone providers pursuant to CC Docket 91-35. Therefore, Telco was not being dilatory in not participating in the proceeding; it simply had no reason to believe it would be affected, especially in such an unjust manner.

When Telco did realize that it would be required to compensate payphone providers at what seemed to be a very inflated rate and that it would be required to pay per-call compensation beginning in October of 1997, Telco undertook considerable efforts to establish a system to allow it to track its calls. Telco’s call tracking method is explained fully in its waiver petition.³³ Upon tracking its calls, Telco realized that its concerns were accurate and that it would be vastly overcompensating payphone providers under the Commission’s interim compensation system. Realizing this fact and recognizing that it could track and compensate payphone providers on a per-call basis, Telco filed the waiver petition at issue in this proceeding. There was no dilatory conduct by Telco warranting denial of its petition.

³³ Telco Waiver Petition at 6-8.

V. CONCLUSION

It is clear that Telco has demonstrated special circumstances that warrant a waiver of the interim compensation rules of the Commission. Such a waiver would be consistent with the 1996 Act and the policies of the Commission favoring per-call compensation. The objections to Telco's waiver are insufficient to preclude the Commission from granting the requested waiver. The Commission should exercise its discretionary authority in this instance and refrain from applying its interim compensation rule in a mechanical and unfair manner.

Respectfully submitted,



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Date: June 13, 1997

CERTIFICATE OF SERVICE

I, Jeannine Allen, hereby certify that a copy of the foregoing **Reply Comments of Telco Communications Group, Inc. On Its Petition For Waiver of Section 64.1301 of the Commission's Rules, CC Docket No. 96-128** was sent to each of the following parties by hand delivery, or by first-class mail (as denoted by asterisk) on this 13th day of June, 1997.

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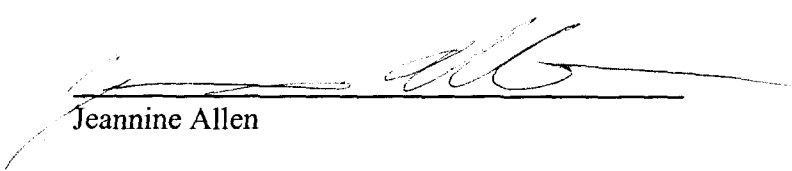
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